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Utah Supreme Court

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Parnell Black; D. Howe Moffat; George H. Lunt; Attorneys for Libelant and Appellant;

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In the Supreme Court of the State of Utah

UTAH LIQUOR CONTROL COMMISSION,

Libelant and Appellant,

vs.

JAMES MANDELES, MRS. JAMES
MANDELES, "JIM'S PLACE",
"MERRY MOON INN", and one
20 foot bar, one 20 foot back
bar, and others, etc.,

Libelees and Appellees.

BRIEF OF APPELLANT

PARNELL BLACK,
D. HOWE MOFFAT,
GEORGE H. LUNT,

*Attorneys for Libelant
and Appellant.*

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of the State of Utah

U. S. DEPARTMENT OF AGRICULTURE

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No. 6227

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

That on June 11, 1939, at Magna, Utah, defendants were operating a place where one of the businesses was the sale of intoxicating liquor in violation of Chapter 43, Laws of Utah, 1935, as amended by Chapter 49, Laws of Utah, 1937. It was a common nuisance, as defined by Section 195 of said Law, existing at said place. On the 11th day of June, 1939, drinks of whiskey had been sold to Eugene Oaks and Ralph Reid and James Mandeles

had been arrested and charged with maintaining a common nuisance and affiant had thereupon taken into his possession certain personal property found upon said premises. A return was made to the Court of the Third Judicial District for Salt Lake County as provided by Section 165 alleging these facts (Ab. 8, 9, 10, 11, 12, 13; Tr. 3, 4, 5, 6). The Court thereupon issued a Warrant of Attachment directing said E. W. Stringfellow, Inspector of the Utah Liquor Control Commission, to hold said property to be dealt with according to law (Ab. 14; Tr. 8). On the same day a Libel of Information was filed by Plaintiff, alleging that said E. W. Stringfellow had seized the property described in his Return and further alleging that sales of intoxicating liquor had been made upon the premises in question on May 14, 1939; June 4, 1939; June 10, 1939 and June 11, 1939, and that during said time defendants had maintained a common nuisance on the premises in question in that they sold intoxicating liquor on said premises and allowed persons to resort to said premises for the purpose of drinking alcoholic liquors in violation of Chapter 43, Laws of Utah 1935, as amended by Chapter 49, Laws of Utah, 1937. Plaintiff accordingly prayed that a time and place for trial be fixed; that notice be given to interested persons, and upon the hearing that the property be condemned and sold as provided by law (Ab. 3, 4, 5, 6, 7; Tr. 1, 2, 2½). The Court thereupon entered an Order fixing June 30, 1939 at 2 P. M. at which time any interested parties might show cause as to why the seized personal property, or any part thereof, should not be

forfeited and sold as provided by law (Ab. 13, 14; Tr. 7). Notices of this fact were duly served upon defendants and copy was posted in defendants' premises in Magna, Utah, where said property had been seized (Ab. 17, 18, 19, 20, 21; Tr. 10, 11, 12). Upon motion of counsel continuances were made until the 18th day of July, 1939. In the meantime claims had been filed by James Giolas, wherein he claimed certain of the property seized was mortgaged by defendants to him as security for a loan of \$500.00, and said Giolas at the hearing was made a party defendant (Ab. 31, 32, 33; Tr. 25, 26). A Claim had also been filed by Alvin P. Holt, doing business as Consolidated Amusements, claiming he was the owner of certain property located in the premises, being coin operated machines, and accordingly Alvin P. Holt was made a party defendant (Ab. 33, 34, 35, 36; Tr. 27, 28). Claim also was filed by Ira Bosen to a coin operated cigarette vending machine and at the trial Ira Bosen was made a party defendant (Ab. 38, 39; Tr. 32, 33). Upon the issues so raised evidence was introduced at the hearing, before Honorable Allen G. Thurman, on July 18, 1939. Counsel stated at this hearing that the only question in dispute was as to what property was used in connection with the operation of the business conducted upon the premises where the personal property was seized. It was conceded that there was no question but what a violation of the Liquor Act had occurred upon the premises and that at least some of the property was subject to confiscation. After the Court had taken the matter under advisement, the decision in the case of

Utah Liquor Control Commission vs. Wooras, Utah, was handed down and attorneys for claimants asked the privilege of reopening the case for the purpose of having evidence introduced on the question as to whether a violation of the Liquor Control Act had occurred in the presence of Inspector E. W. Stringfellow as required by Section 165 of the Liquor Control Act (Ab. 41, 42, 43; Tr. 36, 37). The case accordingly was reopened and additional testimony was introduced on September 6, 1939. The Court thereafter having ruled that E. W. Stringfellow did not witness or have any personal knowledge of the sale of any intoxicating liquor on the premises where said articles were seized or any personal knowledge of any violation of Chapter 43, Laws of Utah, 1935, as amended by Chapter 49, Laws of Utah, 1937 (Ab. 51; Tr. 45), ordered the Libel of Information dismissed and the property returned to James Mandeles and Mrs. James Mandeles (Ab. 52; Tr. 56).

For the purpose of presenting to this Honorable Court all of the facts, a written Stipulation of the matters agreed to by counsel in open court before the Honorable Allen G. Thurman, was reduced to writing and appears as a Stipulation (Ab. 60; Tr. 90).

The evidence as shown by the testimony introduced on July 18, 1939 and September 6, 1939 and the written Stipulation presents the following:

E. W. Stringfellow, an Inspector for the Utah Liquor Control Commission had known James Mandeles for

approximately two years, that during that time Mandeles had run a place of business at Magna, Utah, known of as Jim's Place, being a beer parlor on the main floor and a dance hall and serving bar in the basement, and that the building occupied the southeast corner of an intersection in Magna, Utah, (Ab. 57; Tr. 71, 72). That Exhibit A was a fair drawing of the main floor of the premises (Ab. 57). That on the 11th of June, 1939, with Inspectors Coulam, Jaynes and Mayhue and buyers Ralph Reid and Eugene Oaks, who at the time were employees of the Utah Liquor Control Commission, they went to defendants' place of business (Ab. 57; Tr. 75). That on numerous occasions in the preceding 6 months said Stringfellow had worked the buyers at Mandeles' place of business. About 5 P. M. on June 11th the Inspectors and the buyers met at a point in Magna, near Mandeles' place where they conferred (Ab. 58; Tr. 67). Thereafter the buyers went to Mandeles' place of business. There was an arrangement between the buyers and the Inspectors that if the buyers were able to buy whiskey they were to give the Inspectors a signal. Shortly thereafter the buyers came out and again conferred with Inspectors (Ab. 58; Tr. 77). The buyers again returned to Mandeles' place of business, the Inspectors remaining outside. The Inspectors received the agreed signal and Stringfellow and Mayhue entered the front door while Jaynes and Coulam entered the side door on the west of the building (Ab. 58; Tr. 79). When Stringfellow entered the front door he walked down along by the booths and saw Coulam pick a glass of whiskey off the table

where buyers Reid and Oaks were sitting. Inspector Stringfellow testified he could see Reid sitting in the booth and could see Oaks' arm and could see Inspector Coulam standing in front of them and that defendant James Mandeles was standing nearby at a point marked 3 on Exhibit A (Ab. 59; Tr. 80). He saw Coulam pick up a glass of whiskey from the table where Reid and Oaks were sitting, identified it as a whiskey glass containing a dark liquid. Stringfellow then walked back to the south end of the bar and defendant James Mandeles followed him with 2 glasses in his hand. When Mandeles went to rinse the glasses out Stringfellow took them and there was a dark stain in them, he smelled them and they smelled like whiskey (Ab. 59; Tr. 82).

Inspector Stringfellow also testified that he was in charge of all the Inspectors and buyers at that time and he had been directed by the Plaintiff to see if intoxicating liquors were being illegally sold by defendants at their place of business and if so to obtain evidence there. An arrangement had been made with the buyers before they entered the premises, that if they were able to buy whiskey one was to leave and come out in the street, another arrangement had been made with the Inspectors that if they found whiskey in any of the glasses upon entering the premises a nod of the head would indicate this fact to Inspector Stringfellow. Search of the premises disclosed a pint of Crab Orchard whiskey, from which the seal had not been broken, in a locked drawer in the bar. That thereafter Inspector Stringfellow seized the tangible personal property in the premises.

In addition to the things seen by Inspector Stringfellow on June 11th hereinafter narrated he knew that on May 14, 1939, Eugene Oaks and Ralph Reid, as buyers for the Utah Liquor Control Commission and under the supervision of said Stringfellow, had gone to defendants premises in Magna at 5 P. M. in company with another person named Bill Martin and that at that time defendant Mandeles had sold them three drinks of whiskey for which Oaks had paid 75c and that Ralph Reid had then purchased three drinks of whiskey for 75c (Ab. 61, 63; Tr. 90, 91, 92), and also that on June 4, 1939 at about 7:10 P. M. buyers Oaks and Reid, employees of the plaintiff, bought from Mandeles three drinks of whiskey and again at 7:35 P. M. bought three more drinks of whiskey and that during said time they saw Mandeles sell two other people in the premises drinks of whiskey, and that on June 10, 1939 at about 1:30 A. M. Mandeles gave Reid and Oaks each a drink of whiskey and at about 3:35 A. M. that morning Reid bought from Mandeles three drinks of whiskey for 75c (Ab. 62, 64; Tr. 92, 93).

A. H. Jaynes and Virgil Coulam were, at the time of the raid on Jim's Place, Inspectors of the Utah Liquor Control Commission and they were at the booth where Reid and Oaks were sitting with drinks in front of them and knew it was whiskey and so informed Inspector Stringfellow by a nod of the head (Ab. 65, 66; Tr. 94). Buyers Reid and Oaks testified that they purchased two drinks of whiskey from Mandeles on the evening of June 11th, and that one of the drinks of whiskey was on the

table at the time the Inspectors entered the premises and that the drink seized by Inspector Coulam, as seen by Inspector Stringfellow, had been purchased by the buyers from Mandeles.

QUESTION TO BE DETERMINED.

The one question for determination in this matter is whether or not the evidence affirmatively shows that "a violation of any provision (Liquor Act) occurred in the presence of (E. W. Stringfellow)". If, as a matter of fact, there was no violation in the presence of E. W. Stringfellow within the meaning of Section 165 then there was no legal ground for the forfeiture of the property in question. If, on the other hand, there was a violation of the Act in the presence of E. W. Stringfellow then the case should be reversed and the Court directed to enter an order of confiscation.

ARGUMENT.

This same question was before this Court last year in the case of

Utah Liquor Control Commission vs. Wooras,
.... Utah, 93 Pac. (2d) 455,

where the Court construed the pertinent provisions of Section 165 of the Liquor Control Act of Utah in the following language:

Is the seizure justified under the provisions of Section 165 of the Liquor Control Act, as amend-

ed by Chapter 49, Laws of Utah, 1937? That section provides that: "When a violation of any provision of this act *shall occur in the presence of any inspector* * * * it shall be the duty of *such officer* without warrant (of arrest) to arrest the offender * * * and if *such arresting officer* (the one in whose presence the offense was committed) *has reason to believe that one of the businesses* conducted in the premises *where the violation occurred* was in violation of any of the provisions of this act he shall seize all tangible personal property. * * *" (Italics added).

Under this section the seizure without a warrant may only be made by or under the immediate direction and control of an officer who could at that time and without a warrant lawfully have made an arrest. That is, the officer must be one (a) who personally witnessed a violation of the Act upon the premises; and (b) who has reason to believe that one of the businesses conducted in the premises is in violation of some provision of the Act. An officer without such two qualifications cannot make a lawful seizure without a warrant. The violation, of which complaint is made in this action, is expressly stated by the statute to constitute a misdemeanor. Here a warrant of arrest had not been issued and the liquor violation upon which libelant based its claim for forfeiture of the property occurred at least an hour or an hour and a half before the arrest was made and had not been committed in the presence of the inspector who made the arrest nor was the inspector in whose presence the offense was committed even present in the building when the arrest was made. The meaning of "acts committed in the presence of the arresting officer" is not elastic but as a general proposition is limited to acts that are committed within the arresting officer's knowledge of them, such knowledge being obtained through his sight, hearing, or other

senses, or by the offender's admission of the facts made before his arrest. In *Ingle v. Commonwealth*, 204 Ky. 518, 264 S. W. 1088, 1090, the court said: "We have held in a number of cases, and it appears to be the law everywhere, that an offense, in order to be committed in the presence of the officer, need not occur immediately within his vision, but that if he receives the information of the commission of the offense through any of his senses, the most frequent of which is that of hearing uncommon and suspicious noises which he can readily locate, he is authorized to follow it up, and if it turns out that the offense was actually committed, it will be considered as having been committed in his presence for the purpose of authorizing him to arrest the offender without a warrant although the crime was only a misdemeanor; and if the arrest is then and there made (*but not later*), it will be a valid one, and followed by all of the consequences of such an arrest. That being true, and there is no doubt concerning it since we would incorporate a long list of cases to that effect were it necessary, the officer would necessarily have the right, in determining whether or not an offense was being committed in his presence, to act upon all the facts and appearances then and there before him whether they in the aggregate were obtained by sight, by hearing, by smelling, or by any other of his dependable five senses." (*Italics added.*) The same test as to the validity of an arrest by an officer without a warrant is applied in *Campbell v. Com.*, 203 Ky. 151, 261 S. W. 1107. Similarly, in *Elrod v. Moss*, 4 Cir., 278 F. 123, the Court said that both under state and federal statutes authorizing arrests without warrants, to justify arrests made in such a manner, the officer must have direct personal knowledge, through his hearing, sight, or other sense of the commission of the crime by the accused. *Allen v. State*, 183 Wis. 323, 329, 197 N. W. 808, 39 A. L. R. 782;

State v. Pluth, 157 Minn. 145, 195 N. W. 789; Peru v. United States, 8 Cir., 4 F. (2d) 881; State v. Luth, 85 W. Va. 330, 101 S. E. 434. Neither the arrest nor the seizure were made by nor even in the presence of an officer in whose presence an offense had been committed.

This case and the language above set forth was before Judge Thurman at the time he decided this case now on appeal and the Findings and Decree indicate that the Judge believed that under the opinion in the Wooras case that it was necessary in order to find that a sale of intoxicating liquor, in violation of the Utah Liquor Control Act, had occurred in the presence of an Inspector, that the Inspector should witness all of the details of the sale, which would include the placing of the order by the buyers, the acceptance of the order by the seller, the delivery by the seller and the payment by the buyer. It is conceded in this case that the Inspector did not see the order placed nor the acceptance of the order by the seller, nor did he see the delivery of the whiskey, nor did he see it paid for. However, he did see the whiskey in the possession of the buyer immediately after delivery and he did see the defendant, Mandeles, returning with two whiskey glasses to the bar, and they contained the very definite odor of whiskey. And there is the additional fact that there was no other liquor upon the premises, other than the liquor in the possession of Mandeles, and there were only two other customers in the place at the time. The Court's attention is respectfully called to Section 181 of the Liquor Control Act as follows:

“In any proceeding brought for the purpose of enforcing any provision of this act in proving the sale, disposal, gift or purchase, gratuitous or otherwise, or consumption of alcoholic beverages, it shall not be necessary to show that any money actually passed or alcoholic beverage was actually consumed if the judge hearing the case is satisfied that a transaction in the nature of a sale, disposal, gift or purchase actually took place, or that any consumption of alcoholic beverage was about to take place; and proof of consumption or intended consumption of alcoholic beverage on premises on which such consumption is prohibited, by some person not authorized to consume alcoholic beverages thereon, shall be evidence that such alcoholic beverage was sold or given to or purchased by the person consuming, or being about to consume, or carrying away the same as against the occupant of the said premises.”

It is the contention of Appellant that an offense has been committed in the presence of an arresting officer within the meaning of Section 165, when the officer may, under all the circumstances and from the exercise of his own senses together with other information from sources so reliable that a practical and careful person, having due regard for the rights of others, would act thereon have reasonable and probable cause to believe that a violation of the Liquor Act had been committed and there was no opportunity provided for the officer to obtain a warrant for the search and seizure. This rule is thus stated in the case of

United States vs. Hilsinger, (1922; D. C.)
284 Fed. 585.

Before continuing to explore other cases along the same line, we wish to take this opportunity of pointing out the nature of the Liquor Control Act, because the nature of the Act and its practical application is material to the construction of the verbage appearing therein.

Section 164, which is the section governing searches made pursuant to search and seizure warrants provides that warrants may issue when "alcoholic beverages are possessed, manufactured, sold, bartered, given away * * * in violation" of the act and a seizure may only be made "on finding alcoholic beverages in unlawful possession or use". In other words, by virtue of the fact that intoxicating liquors may be lawfully owned it is not sufficient to justify seizure to merely find intoxicating liquors, in addition thereto it must be found that they are being unlawfully used, which for all practical purposes means they are being offered for sale, or sold. This reduces itself to proof of sale. In other words, it has been generally considered that under Section 164 that you must not only prove sales of intoxicating liquor but that upon a search you must find the stock of liquor from which sales are being made.

Section 165 requires that an offense be "committed in the presence of an Inspector." An Inspector is a peace officer and they are charged with the duty of enforcing the law. An Inspector is not an informant, an undercover man, or a stool pigeon. A violation of the Liquor Control Act is a premeditated offense undertaken for profit, and the perpetrator of the offense undertakes

to protect himself insofar as possible from detection and his first step is to make himself familiar with the officers of the Utah Liquor Control Commission. Becoming practical again, it can be truly said that if the Inspectors of the Utah Liquor Control Commission are to be, and remain, law enforcement officers in contrast with undercover agents, buyers and stool pigeons that it will be impossible for them to be present and see all of the elements constituting the sale of intoxicating liquors. The nature of their particular task requires the employment of undercover agents as buyers from time to time, who can, without disclosing their employment, enter premises where one of the businesses is the unlawful sale of intoxicating liquors and may there purchase intoxicating liquors, then notify the Inspector under whom they work. This having been done it is the contention of Appellant that for the purpose of Section 165 the information of the undercover agents employed by, and working, for the Inspector as well as the knowledge of the other Inspectors working on a particular case should be construed together and if, as is pointed out in cases hereinafter cited, a violation of the law actually occurred and the Inspector was relying upon information which a reasonable and practical person would consider reliable then the seizure will be lawful.

In reviewing the authorities, and there is a host of authorities construing the words "violation in the presence of" it must be borne in mind that practically all of the cases are those under Prohibition Acts where pos-

session of intoxicating liquor was the gravamen of the offense so that a finding of the offending fluid and a determination of possession concluded the offense, whereas above indicated the elements necessary to prove the sale under the act involves much more.

In interpreting the pertinent part of Section 165 it hardly seems necessary to go through any exhaustive analysis of the authorities, but we will cite hereafter a few cases which might be helpful. In

Harry Miles v. State of Oklahoma,
236 P. 57, 44 A. L. R. 129.

Miles was convicted of unlawful possession of intoxicating liquor. The evidence showed that Wiggins had been a guest at the Ketchum Hotel for two or three days and during this time had remained in his room in an intoxicated condition and that Miles had been observed coming to and from Wiggins' room. The manager of the hotel had asked the Sheriff to send a deputy to the hotel, which was done, and the manager pointed Miles out to the deputy, who saw a bottle in the left hand coat pocket of Miles. The deputy arrested Miles and searched him, found four bottles of whiskey on his person. Miles contended that the search and seizure was in violation of his constitutional rights and not admissible in evidence. In sustaining the conviction the court said:

“We are clearly of the opinion that, upon the undisputed facts in this case, the officer was authorized to arrest the defendant, because his conduct in the presence of the officer constituted a breach of the peace.”

It will be noted in this case that the deputy before arresting Miles did not know that the bottle he saw in Miles' coat pocket contained whiskey. The fact that it did contain whiskey and that the possession of whiskey constituted an offense justified the arrest without a warrant and made the search and seizure lawful. In other words, Stringfellow in seeing the whiskey on the table in front of the buyers didn't know then, so far as information coming to his sight or hearing was concerned, that a sale had been made, but the testimony of the buyers proved the missing facts and justified the arrest without the warrant and the seizure of the property in question. The authors of American Jurisprudence state the rule in the following language:

4 Am. Jur. 22.

“What amounts to committing offense in officer's presence. An offense is considered as taking place within the view of an officer where his senses afford him knowledge that one is being committed. Hence, if it is committed in his hearing and so near that he cannot be mistaken as to the offender, this is sufficient. Accordingly, an assault is considered as being committed in the presence of the officer if he is near enough to hear the outcries and arrives immediately after the disturbance has been completed, or if, while outside a house, he hears disorderly conduct within. Where a breach of the peace is committed in the presence of an officer, it is immaterial that he could not, at the time, on account of darkness, actually see the offenders. Under the statutes relating to intoxicating liquor, the offense is regarded as committed in his presence when it is committed with his knowledge, whether through

sight, hearing, or other senses, or by the offender's admission of the fact before arrest. But it seems that the mere transportation of concealed liquor or the carrying of concealed weapons without other circumstances or conditions is not the commission of an offense in the officer's presence so as to authorize an arrest without a warrant."

The West Virginia Court in

West Virginia v. Koil,
103 W. Va. 19, 136 S. E. 510,

holds that a crime is committed in the presence of an officer when the facts and circumstances occurring within his observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case.

The Montana rule as set forth in

State ex rel. Sadler v. District Court (1924)
70 Mont. 378, 225 Pac. 1000,

to the effect that the facts and circumstances must be sufficient to justify the conclusion of the officer that there is probable cause that an offense is being committed in his presence, and in this connection "probable cause" was defined as "the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for arresting the defendant and issuing a complaint."

The Court recognized the problem of enforcing the liquor laws of the State of North Carolina, which in many respects is similar to the case at bar. In the case of

State v. Campbell, (1921)
182 N. C. 911, 110 S. E. 86,

the Court said:

“In the case at bar the officers had information which proved to be correct, and the defendant was carrying on his person, concealed, a quantity of liquor in violation of the provisions of the Consol. Stat. above quoted. The offense was continuing, and the sale had not been consummated at the time the arrest was made. In many cases, unless an arrest is made under these circumstances, the criminal would escape or the crime be committed before the officer could make affidavit and obtain a warrant. For instance, if the officers had information, which was reliable, that one was carrying a concealed weapon, or was on his way to commit an assault with it, surely it would be their duty to arrest the offender, though our statute and our decisions require that in such case they should at once take him before a judicial officer and procure a warrant and institute a judicial investigation.”

Appellant recognizes that an officer has no right to make an arrest on suspicion, neither has an officer the right to search and seize under Section 165 on mere suspicion, but where the premises have been “cased” as in the case at bar, by having buyers working under an Inspector over a period of time and the buyers having made numerous purchases of intoxicating liquor on

the premises, in violation of the law, and where the buyers entered the premises under agreement to notify the Inspectors when the sale is made and a number of Inspectors entered the premises simultaneously for the purpose of blocking exits and forestalling concealment of evidence or destruction thereof, then we contend that if the evidence actually proves the sale of intoxicating liquor in violation of the law and that one of the businesses conducted upon the premises was the business of selling intoxicating liquor in violation of the Liquor Control Act, that then the search and seizure was lawful and the property used in connection with the business is contraband and should be destroyed as provided in Section 168 of the Liquor Control Act.

It is respectfully submitted that the case should be reversed with instructions to the trial Court to enter Findings and Decree that a violation of the act occurred in the presence of Inspector Stringfellow and that the property should be confiscated and sold as provided in Section 168.

Respectfully submitted,

PARNELL BLACK,
D. HOWE MOFFAT,
GEORGE H. LUNT,

*Attorneys for Libelant
and Appellant.*